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No. 75-270

In the Supreme Court of the United States

OCTOBER TERM, 1975

THE SCHOOL DISTRICT OF OMAHA, STATE OF NEBRASKA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 100-134) is not yet reported. The opinion of the district court (Pet. App. 41-98) is reported at 389 F. Supp. 293. The opinion of the district court on the motion for a preliminary injunction (Pet. App. 1-33) is reported at 367 F. Supp. 179.

JURISDICTION

The judgment of the court of appeals (Pet. App. 134-135) was entered on June 12, 1975. A petition for rehearing was denied on July 7, 1975 (Pet. App. 136-137). The petition for a writ of certiorari was filed on August 21, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals properly ruled that the evidence demonstrated that the School District of Omaha was unconstitutionally segregated.

2. Whether the court of appeals erred in establishing guidelines to aid the School District in developing and implementing a school desegregation plan.

STATEMENT

The United States instituted this school desegregation suit in the United States District Court for the District of Nebraska pursuant to Section 407 of the Civil Rights Act of 1964, 42 U.S.C. 2000c-6, and filed a motion for a preliminary injunction. On August 31, 1973, the district court denied that motion (Pet. App. 33-34). Thereafter, black students were permitted to intervene as class plaintiffs-intervenors. After trial on the merits, the district court, on October 15, 1974, issued an opinion and order dismissing the suit (Pet. App. 41-99).

Since segregation in the Omaha schools was apparent at the time of trial, the only question pre-

sented to the district court was whether the School District had intended to bring about or maintain that condition (Pet. App. 43). The district court ruled that the United States had failed to meet its burden of proving that the segregation in the Omaha School District was the result of intentional action on the part of petitioners (Pet. App. 97).

The court of appeals reversed. It held that once it has been established that school authorities have engaged in acts or omissions, the natural, probable, and foreseeable consequence of which is to bring about or maintain segregation, a presumption of segregative intent arises, and the burden shifts to the school district to establish that segregative intent was not among the factors that motivated their actions (Pet. App. 107-108).

Applying that standard to the facts found by the district court, the court of appeals ruled that the United States had established that school officials had engaged in a pattern of acts that had the foreseeable consequence of bringing about segregation in the Omaha schools (Pet. App. 110-129). The court of appeals relied upon evidence establishing that the School District had intentionally segregated its faculty on account of race (Pet. App. 110-113); maintained a student transfer policy that the School District knew had the natural and foreseeable effect of increasing segregation at the predominantly black schools in the system (Pet. App. 114-117); established optional junior high school attendance zones which had a foreseeable segregative impact (Pet.

App. 118-122); constructed schools with the knowledge that they would increase segregation (Pet. App. 123-124); and knowingly took actions that had the "inevitable" effect of creating a virtually all black high school located in a white neighborhood of Omaha (Pet. App. 124-129).

Regarding the School District's defense that it had consistently maintained a neighborhood school policy, the court of appeals stated (Pet. App. 124, n. 28):

> [T]he school district had no such consistent policy with respect to the black schools in Omaha and the schools on the fringe of the black community. Time and again, the policy—if one existed—was discarded whenever it would have had an integrative effect: the defendants riddled it with exceptions, including a virtually automatic transfer policy, optional attendance zones in fringe communities, a shared attendance zone precluding anyone from being compelled to attend the only black high school (Tech), and geographically suspect assignment practices for predominantly black King Middle Schools. It is an understatement to say, as the Supreme Court found in *Keyes* v. *School District No. 1*, *supra* at 212, that "the 'neighborhood school' concept has not been maintained free of manipulation."

The court of appeals ordered that the faculty be fully integrated by the opening of the 1975-1976 school year and that the School District be completely desegregated no later than the 1976-1977 school year (Pet. App. 129-130). The court articulated a set of guidelines to aid the School District in carrying out

its responsibility for developing and implementing a comprehensive plan for achieving student desegregation (Pet. App. 130-132, 136-137).

ARGUMENT

The decision of the court of appeals is correct, and further review is not warranted.

1. Petitioners contend that the court's holding on the standard for proving intent is inconsistent with this Court's decision in *Keyes* v. *School District No. 1, Denver*, 413 U.S. 189, and is in conflict with rulings in other circuits. Although the issue decided in *Keyes* is not directly presented here,[1] the Court's reasoning in that case is applicable here (413 U.S. at 209-210):

> In the context of racial segregation in public education, the courts, including this Court, have recognized a variety of situations in which "fairness" and "policy" require state authorities to bear the burden of explaining actions or conditions which appear to be racially motivated. Thus, in *Swann*, 402 U.S., at 18, we observed that in a system with a "history of segregation," "where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the

[1] In *Keyes* this Court held that proof of intentional segregation of the schools in one area of a school system creates a presumption that other segregated schools in the system are the result of intentionally segregative acts. The burden then rests upon the school officials to establish that "segregative intent was not among the factors that motivated their actions" (413 U.S. at 210).

> racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown." * * * Nor is this burden-shifting principle limited to former statutory dual systems. * * *

Where, as here, the plaintiffs have established that school officials have over a period of time taken actions that have had the probable, natural, and foreseeable effect of creating or maintaining segregation, it is only reasonable to require those school officials to come forward with evidence to establish that their action "was a consistent and resolute application of racially neutral policies." *Oliver* v. *Michigan State Board of Education*, 508 F.2d 178, 182 (C.A. 6), certiorari denied, 421 U.S. 963.[2]

[2] See *Milliken* v. *Bradley*, 418 U.S. 717, 738, n. 18, where this Court approved the district court's findings of unconstitutional segregation within Detroit. Those findings were based on a consideration of the natural, probable, and foreseeable consequences of school board actions. See *Bradley* v. *Milliken*, 338 F. Supp. 582, 587, 592 (E.D. Mich).

Petitioners argue that the court's standard in this case conflicts with Rule 301 of the Federal Rules of Evidence (which became effective after the court of appeals' decision in this case). Contrary to petitioners' contention, however, the only burden that is shifted to the school district under the court's standard is "the burden of going forward with evidence to rebut or meet the presumption," not "the burden of proof in the sense of the risk of nonpersuasion" (Rule 301). The burden of persuasion on the question of segregative intent remains on the plaintiffs. The effect of the presumption is that the plaintiffs may satisfy their burden by proof that

The courts of appeals are in agreement on this standard of proof. The Second Circuit, in *Hart* v. *Community School Board of Education*, 512 F.2d 37, 50, applied a standard similar to the one applied below (see Pet. App. 108-109). Similarly, a panel of the Sixth Circuit ruled in *Oliver* v. *Michigan State Board of Education*, *supra*, 508 F.2d at 182:

> A presumption of segregative purpose arises when plaintiffs establish that the natural, probable, and foreseeable result of public officials' action or inaction was an increase or perpetuation of public school segregation. The presumption becomes proof unless defendants affirmatively establish that their action or inaction was a consistent and resolute application of racially neutral policies.[3]

Cf. *Morgan* v. *Kerrigan*, 509 F.2d 580, 588 (C.A. 1), certiorari denied, 421 U.S. 963.[4] The imposition of

the foreseeable consequence of the school board's actions was to create or maintain a segregated school system.

[3] *Higgins* v. *Board of Education of City of Grand Rapids*, 508 F.2d 779 (C.A. 6), decided three days prior to the decision in *Oliver*, is not inconsistent with *Oliver*. The panel in *Higgins* recognized that a court may infer segregative intent from all the circumstances (508 F.2d at 793); it upheld a finding of no intentional segregation because it believed that the school board adequately demonstrated that its "neighborhood school policy was in reality neutral" (*id.* at 791).

[4] The Ninth Circuit's decisions in *Soria* v. *Oxnard School District Board of Trustees*, 488 F.2d 579, and *Johnson* v. *San Francisco Unified School District*, 500 F.2d 349, do not conflict with this case. In *Soria*, the plaintiffs argued that the school board's segregative intent could be inferred from

such a requirement is particularly appropriate here, where petitioners were found to have "discarded" their usual assignment policy "whenever it would have had an integrative effect" (Pet. App. 124, n. 28).

2. Petitioners contend that the court of appeals erred in establishing guidelines to be followed by the School District in implementing the court's order to desegregate (Pet. 28-31). Petitioners do not suggest that any aspect of the directions of the court of appeals is inappropriate, but only that the court should not have issued them. Although the court was not required to provide such guidance to the School District, it is not prohibited from doing so in the interests of judicial economy and consistent application of the requirements of the Fourteenth Amendment.[5]

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the foreseeable consequences of its acts. The court of appeals did not reject that proposition; it held only that, when the school board is prepared to present evidence showing that it did not intentionally segregate its schools, there is a disputed issue of material fact that precludes the granting of summary judgment for the plaintiffs. In *Johnson*, the district court had treated proof of segregative intent as unnecessary in a school desegregation case, and the court of appeals reversed on the authority of this Court's decision in *Keyes, supra*, and the Ninth Circuit's decision in *Soria*.

[5] Petitioners suggest that the court of appeals should have made specific findings concerning the transportation of students, as required by the Equal Educational Opportunities Act of 1974, Pub. L. 93-380, 88 Stat. 514. The court of appeals, however, merely formulated guidelines for the development of an adequate desegregation plan. The plan is to be developed by the School District and approved by the district court. The court stated that "[t]he integration techniques to be used

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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by the school board in meeting the * * * guidelines shall consist of those which have been approved by the Supreme Court, including the pairing or clustering of schools, the realignment of school assignment zones, and the relocation of portable classrooms" (Pet. App. 131). Transportation would be used only "[t]o the extent * * * required to achieve an integrated school system" (*ibid.*). There is no reason to assume that the district court will not make the findings required by the statute before approving a desegregation plan.

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